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YEAP LEONG HIN & ORS.

v.

HERBERT J. HO JR. & ORS.

HIGH COURT MALAYA, PENANG

MOHAMED DZAIDDIN J

b

[SUIT NO. 23-62-1986]

22 FEBRUARY 1991

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COMPANY LAW: *Voluntary liquidation - Joint liquidators - Loan made without security - Interest rate which exceeds prevailing rate - Delay in contribution of assets - Fiduciary duties - Valid resolution - Consent of contributories - Whether proper exercise of discretion - Breach - Companies Act 1965, ss. 264, 285*

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The Company, YB, was incorporated in 1979 with the authorised capital of RM5,505,000 divided into 55,050 shares of RM100 each which were fully paid. In 1960, YKH died and left behind 6,728 shares in YB. Probate of YKH was granted to his mother, M, and his brother B, who died in 1977 and 1980 respectively. As YKH's estate was unadministered from 1980-1983, letters of administration *de bonis non* was granted to the plaintiffs. In 1968, YB went into members' voluntary liquidation whereby the defendants H1, H2 and H3 were appointed as joint liquidators.

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The plaintiffs allege that in 1973, the defendants caused the company YB to loan RM800,000 (the said sum) without security for a period from 1973 to 1981 at the interest rate of 5.75% to Yeap Hock Hoe Holdings Sdn. Bhd. (YHH) - it is the plaintiffs' allegation that by making this loan, the defendants had breached their fiduciary duties as liquidators under ss. 264 and 285 of the Companies Act 1965 (the Act) as they had failed to act expeditiously in realising the assets of the company and to make the necessary distributions. The allegation was that the deposit of the said sum was more for the benefit of B, the alter ego of YHH and that the defendants, as a result of B's influence, had deprived themselves of their independence as liquidators in winding-up a company.

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The defendants contended that they had acted in accordance with the wishes of the contributories pursuant to s. 289(1) of the Act and denied that the said sum was placed with YHH as a loan, submitting that it was a temporary deposit made with the approval of the majority of the shareholders. They contended that under s. 285, the liquidators had a discretion to invest so that the assets of the company was securely invested. H1 also said that further distributions (of the proceeds of liquidation) had been made by the defendants in 1985, 1986 and 1987 except for two pieces of property (which could not be sold because of the recession) and the fixed deposit of RM300,000 which had to remain to meet certain contingencies like taxation.

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The issue for the Court was whether the defendants had breached their fiduciary duties under ss. 264 and 285 of the Act.

*h***Held:**

[1] Based on the evidence, the defendants, when they placed the said sum with YHH, had acted in accordance with the wishes of the majority shareholders of YB and this was corroborated by the resolution passed on 15 February 1973, AB1, which was later ratified at the Annual Contributories Meeting on 20 March 1987.

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[2] From a reading of AB1, the said sum was placed with YHH temporarily to earn interest and the said sum therefore could not be a loan. As interest earned on the said sum was higher than the prevailing bank interest at the relevant time, there was no question of any shortfall of interest on the said sum for the defendants to be liable to the contributories.

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[3] As the first plaintiff, a qualified accountant, had not at the relevant time, moved any resolution regarding his dissatisfaction with the performances of the liquidators at the two annual contributories' meeting he attended and since he agreed that the majority of shareholders approved for the said sum to be deposited with YHH, he could not now come to Court and complain about the performance of the defendants.

b

[4] Based on the Court's opinion that the complaint of the plaintiffs was mainly in relation to the defendants not distributing and winding-up the assets within reasonable time and the Court's acceptance of H1's explanation as to why the distribution of assets could not be completed, there has not been a breach of s. 264 of the Act.

c

[5] The decision of the defendants to place the said sum with YHH, when seen in the context of their overall duty to the company, was a proper exercise of their discretion as voluntary liquidators as they followed the wishes of the majority shareholders, which they are duty bound to do under s. 285 of the Act. The defendants had therefore not breached s. 285(1) of the Act and have in fact acted with a reasonable degree of care and negligence in the exercise of their powers under the Act and the discharge of their duties as liquidators of the company.

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[Plaintiffs' claim dismissed.]

Cases referred to:

Re House Property and Investment Company Ltd. [1954] Ch 576

Knowles v. Scott [1891] 1 Ch 717

Re 67 Budd Street Pty. Ltd. & Ors.; The Commonwealth of Australia v. O'Reilly [1984] 2 ACLC 190

Re Metropolitan Fuel Pty. Ltd. [1969] VR 328

Re Agricultural Industries Ltd. [1952] 1 All ER 1188

Yeomans v. Walker & Anor. 10 ACLR 753

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Legislation referred to:

Companies Act 1965, ss. 237, 264, 280, 285

Companies Act 1948 [UK], s. 302

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For the plaintiff - Tan Beng Hong; M/s. Mahinder Singh Dulku & Co.

For the defendant - Tan Phock Kin; M/s. Thillaimuthu & Phock Kin

[Editor's note: The plaintiffs have appealed to the Supreme Court.]

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JUDGMENT

Mohamed Dzaidin J:

The plaintiff's claim in this action is primarily against the liquidators of Yeap Brothers Sdn. Bhd. whom the plaintiffs alleged have committed breach of fiduciary duties under the Companies Act 1965.

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The plaintiffs are the personal representatives of Yeap Kim Hoe, deceased, who died on 22 September 1960 leaving behind 6,728 shares of RM100 each in Yeap Brothers Sdn. Bhd. (the company). The company was incorporated on 10 December 1959 with the authorised capital of RM5,505,000 divided into 55,050 shares of RM100 each which were fully paid. Sometime in 1968, it went into members' voluntary liquidation whereby the defendants were

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- a* appointed joint-liquidators. By their amended statement of claim, the plaintiffs alleged that on 21 February 1973 the liquidators caused the company to make a loan of RM800,000 with interest at the rate of 5.7% per annum to Yeap Hock Hoe Holdings Sdn. Bhd. without security for a period from 21 February 1973 to 21 February 1981. The plaintiffs further alleged that the defendants had made some other unauthorised advances, which incidentally were not particularised in the amended statement of claim. In the result, the plaintiffs averred that the making of the aforesaid loan by the defendants was in breach of their fiduciary duties as liquidators under ss. 264 and 285 of the Companies Act 1965 (the Act). Thus, to sum up their dissatisfaction, the plaintiffs pleaded in para. 6 of the amended statement of claim as follows:

- c* Apart from the aforesaid statutory obligations every liquidator is under a fiduciary duty to the creditors and contributories of the company of which he is liquidator to have solely and exclusively the interests of such creditors and contributories.

- d* The defendants, by their amended defence denied the allegations of the plaintiffs and averred that they had acted in accordance with the wishes of the contributories pursuant to s. 289(1) the said Act. Further, they denied that the sum of RM800,000 placed with Yeap Hock Hoe Holdings Sdn. Bhd. was a loan. They contended it was a temporary deposit made with the approval of the majority of the contributories including the estate of Yeap Kim Hoe, deceased.

- e* In the notice to admit facts, the parties agreed to the following facts. The plaintiffs' shares in the company constituted 12% of the total issued shares, which are 55,050 shares of RM100 each. Upon the death of Yeap Kim Hoe, who died testate on 22 September 1960, probate was granted to his mother, Lee Cheng Kin, and his brother, Yeap Hock Hoe, both died on 3 March 1977 and 14 May 1980 respectively. As the estate of Yeap Kim Hoe was unadministered from 15 May 1980 to 22 February 1983, Letters of Administration *de bonis non* was granted to the plaintiffs. The said sum of RM800,000 deposited with Yeap Hock Hoe Holdings Sdn. Bhd. was approved by the majority of the shareholders. It carried interest at 5 $\frac{3}{4}$ % per annum.

- f* The evidence of the parties were as follows. According to Yeap Leong Hin (PW1), on 28 February 1985, he wrote to the defendants regarding the amount of RM428,780 shown in the liquidators' Account of Receipts and Payments for December 1981. He wanted to know how it was received from Yeap Hock Hoe Holdings Sdn. Bhd. Not satisfied with the explanation given by the defendants, the plaintiffs requested the liquidators to furnish more particulars of the alleged loan of RM800,000 made to Yeap Hock Hoe Holdings Sdn. Bhd., that is, the amount, date and period of loan, interest and whether secured or not, and if it had been fully repaid. Upon refusal of the liquidators to entertain the request, the plaintiffs retained solicitors (Zain & Co. of Kuala Lumpur), who, on the plaintiffs' instructions wrote to the liquidators requesting for the answers (AB5). On 30 July 1985, the defendants' present solicitors accordingly gave a formal reply stating that the sum of RM800,000 was deposited by the liquidators with Yeap Hock Hoe Holdings Sdn. Bhd. carrying an interest of 5 $\frac{3}{4}$ % per annum. It was pointed out by them that this sum was given as a deposit and not a loan and that it had been fully repaid and that the amount of RM428,750, as queried by the two co-administrators was the interest from the sum deposited. See AB7.

- h* Encik Yeap further testified that he had also seen and examined the liquidators' account of receipts and payments and statement of the position of the winding-up of Yeap Brothers Sdn. Bhd. for year 1982 to 1988. There were certain items which he did not agree. As a co-administrator, he was wholly dissatisfied with the performances of the liquidators and
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alleged that the defendants had been in breach of ss. 264 and 285 of the Companies Act. He relied on his solicitors' letter to the defendants' solicitors dated 14 November 1985 (PBD12-14) wherein the plaintiffs disputed that the deposit of RM800,000 with interest at 5.75% with Yeap Hock Hoe Holdings Sdn. Bhd. had been fully repaid. There was still a sum of RM58,742.38 remaining due. However, the crucial issue raised in the said letter was the justification for the defendants in placing a sum of RM800,000 as deposit with Yeap Hock Hoe Holdings Sdn. Bhd. which is a private limited company.

Under cross-examination, PW1, who is a qualified accountant, agreed that he was familiar with the accounts. He admitted having attended the annual contributories meetings on two occasions and never moved any resolution to protest regarding the liquidators' accounts, although he did raise verbal objection on certain items. Later he instructed his solicitors' to write to the defendants. He admitted that he made no attempt to reply to the letter of the defendants' solicitors. Lastly, he agreed that the interest rate of 5.75% per annum was higher than the prevailing bank interest rate at the relevant time.

Encik Herbert J Ho Jr., the 1st named defendant, testified on behalf of the liquidators. On the allegation of the plaintiffs that the defendants had failed to act expeditiously in realising the assets of the company and to make the necessary distributions, he stated that after obtaining a consent judgment on 17 June 1985 whereby the plaintiffs agreed to stay further proceedings pending complete distribution of the proceeds of liquidation, the liquidators made further distributions on 2 July 1985, 23 July 1986, 11 February 1986 and finally on 24 April 1987. However, as at June 1990, only the fixed deposit sum and two pieces of property remained to be distributed, the reason being that in the case of the two properties, they could not be sold due to recession and jointly owned by the estate of Madam Lee Cheng Kin. As for the fixed deposit of RM300,000 it had to remain in fixed deposit to meet certain contingencies like taxation.

DW1 believed that the liquidators had acted faithfully and diligently in the discharge of their duties. He stated that they had acted in accordance with the wishes of the contributories. On the placing of RM800,000 as deposit with Yeap Hock Hoe Holdings Sdn. Bhd., the liquidators acted on the strength of the resolution dated 15 February 1973 (AB1) which was approved by the majority of the shareholders who had authorised the late Yeap Hock Hoe to act on their behalf. See AB16. The resolution was later ratified at the Annual Contributories Meeting on 20 March 1987. He denied that the defendants had given any unauthorised advances.

Under cross-examination, DW1 denied the suggestion that by placing the sum of RM800,000 into a private company the defendants were in breach of s. 285 of the Act.

Submissions:

At the outset of the hearing, Counsel agreed that there was only one issue for determination, that is, whether or not the defendants were in breach of their fiduciary duties under ss. 264 and 285 of the Act.

Section 264 states as follows:

Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied *pari passu* in satisfaction of its liabilities, and subject to that application shall unless the articles otherwise provide be distributed among the members according to their rights and interests in the company.

a The relevant part of s. 285 states:

(1) Whenever the cash balance standing to the credit of any company in liquidation is in excess of the amount which, in the opinion of the committee of inspection, or, if there is no committee of inspection, of the liquidator, is required for the time being to answer demands in respect of the estate of the company, the liquidator, if so directed in writing by the committee of inspection, or, if there is no committee of inspection, the liquidator himself, may, unless

b the Court on application by any creditor thinks fit to direct otherwise and so, orders, invest the sum or any part thereof in securities issued by the Government of Malaysia or of any state of Malaysia or place it on deposit at interest with any bank, and any interest received in respect thereof shall form part of the assets of the company.

Encik Tan Beng Hong, for the plaintiffs, submitted that there was no justification for the liquidators to deposit the said sum of RM800,000 with Yeap Hock Hoe Holdings Sdn. Bhd., but instead could have been distributed amongst the contributories as early as February 1973. In this respect, Counsel submitted that the defendants should have exercised their duties by distributing the assets of the company amongst the contributories under s. 264 of the Act. Encik Tan drew my attention to the case of *In re House Property and Investment Company Ltd.* [1954] Ch 576 where he relied on the observations of Roxburgh J who made reference to s. 302 of the English Companies Act 1948 (which is in *pari materia* with our

c s. 264) and stated at p. 612 as follows:

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Of course, a liquidator is not to distribute the property among the members before he had dealt with the liabilities. That is plain enough, but I am quite certain that, though it does not say so in express terms, the policy of the Act as expressed in that section carries the implication that he has to deal with the liabilities within a reasonable time, and thereafter to distribute amongst the members within a reasonable time.

e Alternatively, Counsel submitted that the said sum could have been invested in government securities or placed on deposit with interest at any bank to comply with s. 285 of the Act. It should be noted that the plaintiffs agreed that the interest of 5.75% per annum paid by Yeap Hock Hoe Holdings Sdn. Bhd. was higher than the prevailing rate of interest payable by commercial banks at the relevant time.

f Counsel alleged that the decision to place the said sum of RM800,000 with Yeap Hock Hoe Holdings Sdn. Bhd. was more for the benefit of Datuk Yeap Hock Hoe, deceased, the alter ego of Yeap Hock Hoe Holdings Sdn. Bhd. He had no business to supervise the liquidation of the company. In the circumstances, Counsel submitted that the defendants in allowing themselves to be influenced by the late Datuk Yeap had in effect deprived themselves of their independence as liquidators in winding-up the company. Counsel referred to an Australian case of *Re 67 Budd Street Pty. Ltd. & Ors.; The Commonwealth of Australia v. O'Reilly* [1984] 2 ACLC 190, where in an application for consequential relief seeking for the liquidator of companies to be removed and that another be appointed in his place, Fullagar J of the Supreme Court of Victoria held that in the case of position of a fiduciary character, duties must not be performed impartially in fact, but their performance must also bear on the gaze of all reasonable persons the clear appearance of impartiality.

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h Encik Tan Phock Kin, for the defendants, in his reply, deliberated on the evidence adduced by both PW1 and DW1. He submitted that there was no breach of s. 264 because the distributions of the assets proceeded quite normally until the solicitors for the estate of Yeap Chor Ee, deceased, required the liquidators to suspend distribution. DW1 had also given his reasons why the distribution could not be completed in respect of the remaining assets and cash in the fixed deposit.

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On s. 285, Counsel submitted that the object of the section was to see that the assets of the company were securely invested. The section gave the liquidators discretion to invest. In this case, Counsel submitted that the sum of RM800,000 was deposited with Yeap Hock Hoe Holdings Sdn. Bhd. in order to conform with the wishes of the majority shareholders pursuant to s. 289(1) of the Act. Counsel referred me to *Re Metropolitan Fuel Pty. Ltd.* [1969] VR 328, which cited with approval the statement in *Palmer*, 12th Edn., Vol. 1 p. 132 that:

In considering the wishes of any contributories or creditors, the Court will have regard to all the circumstances and to the reasons they assign for their wishes.

In reply to the above point, Encik Tan Beng Hong referred me to *Yeomans v. Walker & Anor.* 10 ACLR 753 which considered *Re agricultural Industries Ltd.* [1952] 1 All ER 1188 and held that having regard to ss. 237 and 289 of the Companies Act 1961 (NSW) it might be appropriate for a liquidator to have regard to the wishes of the majority shareholders even where no general meeting was held. The liquidator was not, however, bound to accept the wishes of the majority.

Conclusions:

After considering the evidence and the submissions of Counsel, in my opinion, the defendants have not committed any breach of fiduciary duties toward the plaintiffs in the performance of their duties as liquidators for the purpose of winding up the affairs and distributing the assets of the company. My reasons for coming to this conclusion are as follows. First, based on the evidence of the parties, I am satisfied that the liquidators have acted properly in the discharge of their duties. Here, I accept the evidence of Encik Herbert Ho Jr. (DW1) that the liquidators had acted faithfully, diligently and expeditiously. On the placing of the sum of RM800,000 with Yeap Hock Hoe Holdings Sdn. Bhd. I accept his explanation that the liquidators had acted in accordance with the wishes of the majority shareholders of the company. This is corroborated by the resolution passed on 15 February 1973 (AB1) which was later ratified at the Annual Contributories Meeting on 20 March 1987. In addition, I also accept his explanation why the winding-up and the distribution of the assets was delayed and had yet to be completed.

Secondly, on the question whether or not the sum of RM800,000 deposited by the liquidators with Yeap Hock Hoe Holdings Sdn. Bhd., was a loan, in my opinion it could not be a loan because from my reading of the resolution AB1 the said sum was placed with Yeap Hock Hoe Holdings Sdn. Bhd. temporarily to earn interest. In fact, according to PW1, his quarrel was that the said sum should have been invested in a listed company or financial institution. Whatever his quarrel was, I think there was no reason for the plaintiffs to make an issue out of this because interest charged on the said sum, as admitted by the plaintiffs, was higher than the prevailing bank interest rate at the relevant time. In the circumstances, there was no question of any shortfall of interest on the sum of RM800,000 for the defendants to be liable to the contributories.

Thirdly, PW1 had admitted that he did not move any resolution regarding his dissatisfaction with the performance of the liquidators at the two Annual Contributories Meetings which he attended. He also agreed that the majority of the shareholders of the company approved for the sum of RM800,000 to be deposited with Yeap Hock Hoe Holdings Sdn. Bhd. In the premises, he could not now come to Court and complained about the performance of the defendants.

- a* On the question of s. 264 (*supra*), the complaint of the plaintiffs is not so much of the defendants not distributing the property of the company, upon winding-up, among the members according to their rights and interest in the company, but from the submission of Encik Tan Beng Hong, I gather that it has to do mainly with the defendants not distributing and winding-up the assets within a reasonable time. I form this opinion based on the case of *In re House Property and Investment Company Ltd.* (*supra*) cited by Counsel. Thus, in
- b* view of my above finding that I accept the explanation of DW1 why the distribution of the assets could not be completed so that the company would be wound-up, it follows that there is no breach of s. 264 of the Act. It has been observed that preserving the assets, giving proper attention to the administration of the company, acting with due dispatch and ensuring adequate knowledge and understanding of the affairs of the company are largely matters of common sense. (per Marks J in the *Peter Harvey* case [1980] VR 669.
- c* I am also of opinion that the liquidators have not breached s. 285(1) of the Act. It is clear to me that subs. (1) requires the liquidators, in their discretion, to invest any surplus cash balance of the company in liquidation in securities issued by the Government of Malaysia or any State of Malaysia or place it on deposit at interest with any bank. Granted that in this case, the liquidators did not place the sum of RM800,000 in any of the authorised institutions.
- d* However, in my opinion their decision must be seen in the context of their over-all duty to the company. Indeed, a voluntary liquidator is not for the creditors or contributories but is an agent of the company (*Knowles v. Scott* [1891] 1 Ch 717). Thus, on the direction of the majority shareholders of the company, the defendants deposited the money with Yeap Hock Hoe Holdings Sdn. Bhd. and earned a higher interest rate than the commercial bank. Now, can the liquidators in such circumstances be guilty of a breach of their fiduciary duty? In
- e* my opinion, they cannot because in exercising their discretion as voluntary liquidators, they are duty-bound to follow the wishes of the majority shareholders. Under s. 258 (one of the provisions applicable only to Members' Voluntary Winding Up), liquidators are appointed by the company in general meeting, who determines their salaries and exercises general supervision over the performances of the liquidators' duties. In fact, upon considering the matter as a whole, I am satisfied that the defendants had acted with reasonable degree of
- f* care and diligence in the exercise of their powers under the Act and the discharge of their duties as liquidators of the company.

For reasons stated above, plaintiffs' claim in this action is hereby dismissed with costs.

Also found at [1991] 2 CLJ 1230

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